**SUPREME COURT OF THE STATE OF WASHINGTON**

Case No. 80251-3

(Court of Appeals No. 57011-1-I)



VERNON BRAATEN,

Respondent,

v.

BUFFALO PUMPS, INC., et al.,

Petitioners.

# SUPPLEMENTAL BRIEF OF RESPONDENT

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## I. ISSUE PRESENTED

Whether the Court of Appeals correctly held that a manufacturer has a duty to warn of hazards involved in the use of its product.

## II. STATEMENT OF THE CASE

### A. Factual Background

Respondent Vernon Braaten worked as a pipefitter at Puget Sound Naval Shipyard from 1967 to 2002, performing regular maintenance on equipment on naval vessels, including pumps, and valves, that exposed him to asbestos. Mr. Braaten testified that he worked on heat application pumps, including Buffalo Pumps and DeLaval pumps.[1] He changed the packing on the pumps, which required removing the exterior insulation, removing the old packing, replacing the packing, and then reapplying asbestos insulation to the exterior of the pump. CP 2347-48; CP 582-671. Mr. Braaten also worked with valves on a daily basis, including Crane and Yarway valves. CP 2036; CP 1323-24, 1335-36. He removed asbestos-containing exterior insulation from the valves, removed asbestos-containing packing from the valves, repacked the valves, and then reapplied insulation to the valves. CP 2036-40; CP 1323-24, 1335-36. This "replacement of interior asbestos gaskets and packing, which usually

[1] The successor-in-interest to DeLaval is IMO Industries, Inc.

had to be ground, scraped, or chipped off[,]" caused the release of respirable asbestos. Braaten v. Saberhagen Holdings, Inc., 137 Wash. App. 32, 37-38, 151 P.3d 1010 (2007). Mr. Braaten labored unprotected and so inhaled asbestos as he worked. Id. at 38. In 2003, Mr. Braaten was diagnosed with mesothelioma caused by the inhalation of asbestos dust. Id. He died on October 23, 2007.[2]

All of the petitioners "either sold products containing asbestos gaskets and packing or were aware that asbestos insulation was regularly used in and around their machines." Id. Braaten proffered evidence that petitioners manufactured their products with asbestos components and placed them in the stream of commerce. The evidence also showed that petitioners knew that some uses of their products required them to be insulated with asbestos-containing insulation, and that they even specified the use of such insulation.

For example, Buffalo Forge, the predecessor in interest to Buffalo Pumps, manufactured its pumps and placed them in the stream of commerce with asbestos-containing gaskets and packing. CP 1250; CP 768-69. Certified copies of Buffalo Pumps' plans from the National Archive and Records Administration indicate that Buffalo Pumps actually

[2] Counsel for respondent will shortly file a motion for substitution pursuant to RAP 3.2.

specified the use of external insulation, including asbestos felt, asbestos cloth, and asbestos cement, with their pumps. CP 1251; CP 776. Buffalo Pumps' expert witness, Admiral Malcolm MacKinnon III, testified that during the relevant time period, Buffalo pumps used for heat applications would have required asbestos-containing insulation to function properly. CP 1257-59: CP 781-86.

Richard Salzmann, corporate representative for IMO, testified that its predecessor DeLaval sold asbestos insulation materials for use with its turbine-driven equipment. CP 6434-6466. An internal DeLaval letter indicates that the Turbine Division used several asbestos materials, including Cerafelt, asbestos cloth, Thermobestos Block, and No. 352 cement. CP 7218. Internal memos, questioning what non-asbestos substitutes DeLaval was going to use on its pumps to comply with OSHA regulations, also suggest that DeLaval used asbestos-containing insulation and supplied such insulation for use with its pumps. See CP 7235-37.

Horace Maxwell, Yarway's expert, stated that between 1908 and 1982, Yarway manufactured "a multitude of products that had asbestos-containing parts in them." CP 6204; see also CP 5858. Mr. Maxwell also confirmed that boiler trim valves, which Mr. Braaten specifically identified as a product he worked with, contained and utilized asbestos-

containing packing and gaskets. CP 6219-20. The accepted practice was to insulate steam control valves, CP 6229, and one would expect boiler trim valves also to be insulated. CP 6216. Mr. Maxwell stated that exterior insulation was required on Yarway valves for the purposes of efficiency, and that on a ship, he had never seen the valves associated with a boiler that were not insulated. CP 6216-17. A Yarway sales manual advertises "[s]elected materials, coupled with Yarway workmanship in machining and assembly, guarantee long, satisfactory service," and indicates that the packing used in Yarway products was "jacketed type asbestos." CP 6114.

Similarly, Crane manufactured valves and then sold them with asbestos-containing gaskets and packing. CP 2035-36: CP 1298-1300. Crane advertised that it carefully selected the packing that came with its valves. CP 2041; CP 1276. A Crane catalogue advertised woven asbestos and core packing with an asbestos jacket for use with Crane bronze and iron body valves, and Johns-Manville pre-shrunk asbestocel, zero pipe insulation, magnesia-asbestos insulation, asbestos sheet millboard, asbestocel blocks, magnesia-asbestos blocks, and asbestos cements. CP 1276, 1288-89. Crane thus knew that its valves would be repacked with asbestos-containing materials, and that they would be insulated with

asbestos-containing thermal insulation. Crane not only specified the use of these materials, but provided them for sale to its customers.

**B. Procedural Background**

In January 2005, Mr. Braaten brought the instant lawsuit in King County. CP 1-8.[3] Thereafter, several of the petitioners, all of whom manufactured equipment, moved for summary judgment, contending that they had no duty to warn of dangers associated with asbestos-containing products used on, in, and with their equipment. CP 264-66; CP 459-80; CP 481-98; CP 5424-43; 5452-67.

Judge Armstrong granted the motions. She ruled that "Buffalo Pumps, Inc. owed no duty to plaintiff to warn of the dangers of products that it did not manufacture or otherwise place into the stream of commerce." CP 7307. She made similar rulings with respect to IMO, CP 7318-21, Yarway, CP 7323-25, and Crane Co., CP 7311; CP 7314-16.

The Court of Appeals reversed, holding that under a strict liability theory, the manufacturers had a duty to warn regarding the safe use of their products. Braaten, 137 Wash. App. at 47. The Court of Appeals also ruled that with regard to negligence, "the manufacturers of the pumps,

[3] Mr. Braaten originally brought suit in Texas. CP 337-65. One of the defendants, Goulds Pumps, was granted summary judgment. CP 385. Thereafter, on December 13, 2004, plaintiff nonsuited his case in Texas and brought the instant suit.

turbines, and valves . . . had a duty to warn about maintenance procedures for their products that would release . . . dangerous fibers [from asbestos] into the air." Id. at 49. Since a trier of fact could find, based on the record in this case, that the manufacturers knew or should have known that exposure to released asbestos fibers was a hazard involved in the use of their products, the Court of Appeals concluded that Judge Armstrong erred in granting summary judgment for the manufacturers.

## III. ARGUMENT

The equipment manufacturer petitioners in this case insist that the central issue is whether they have a duty to warn of dangers associated with a third party's product. In other words, the manufacturers try to disassociate the asbestos insulation, gaskets, and packing from their own equipment. But the Court of Appeals was correct in finding that "[c]ontrary to the manufacturers' framing of the issue, their duty was not to warn of dangers associated with a third party's product, but of dangerous aspects of their own product: namely, that using their products as intended would very likely result in asbestos exposure." Id. Moreover, contrary to the petitioners' arguments that the Court of Appeals' holdings with respect to duty are novel, as respondent will show below, they are

firmly grounded in well-established Washington law and black letter products liability law.

## A. Standard of Review

This Court reviews *de novo* the Court of Appeals' reversal of the Superior Court's summary judgment ruling. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990)). All facts are to be considered in the light most favorable to the nonmoving party, and summary judgment may be affirmed only if, based on all of the evidence, reasonable persons could reach but one conclusion. Vallandigham, 154 Wn.2d at 26. In this case, defendant manufacturers, as the moving parties, have the burden of showing that there is no genuine issue as to any material fact with respect to their duty to warn. Id.

## B. The Court of Appeals Correctly Applied the Restatement (Second) of Torts §402A

### 1. This Court's Precedent Under Restatement (Second) of Torts §402A Places a Duty on Manufacturers to Warn of Foreseeable Uses of Their Products

This Court has adopted the doctrine of strict products liability set forth in the Restatement (Second) of Torts §402A,[4] Ulmer v. Ford Motor Co., 75 Wn.2d 522, 452 P.2d 729 (1969), emphasizing that "the duty of a manufacturer is to design a product that is reasonably safe for its intended use and for other uses which are foreseeably probable." Galvan v. Prosser Packers, Inc., 83 Wash.2d 690, 693, 521 P.2d 929 (1974). This Court has explicitly adopted the Restatement provisions with regard to warnings. Haysom v. Coleman Lantern Co., 89 Wash.2d 474, 479, 573 P.2d 785 (1978); Teagle v. Fischer & Porter Co., 89 Wash.2d 149, 570 P.2d 438 (1977); Haugen v. Minnesota Mining & Mfg. Co., 15 Wash. App. 379, 388, 550 P.2d 71 (1976).

Thus, a "manufacturer's duty of ordinary care includes a duty to warn of hazards *involved in the use of the product which are or should be known to the manufacturer.*" Baughn v. Honda Motor Co., Ltd., 107 Wn.2d 127, 137, 727 P.2d 655 (1986) (emphasis added) (citing Novak v. Piggly Wiggly Puget Sound Co., 33 Wash. App. 407, 412, 591 P.2d 791 (1979) and Restatement (Second) of Torts §388 (1965)). Or as this Court put it in Haysom, a manufacturer "may be held strictly liable if a plaintiff

[4] Because Mr. Braaten's exposure to asbestos occurred prior to enactment of WPLA in 1981, his claims are governed by Washington common law negligence and strict product liability law in effect prior to WPLA. See Mavroudis v. Pittsburgh Corning Corp., 86 Wn. App. 23, 33-34, 935 P.2d 684 (1997).

establishes that a product is unreasonably dangerous, though faultlessly manufactured, when placed in the hands of a user without giving suitable and adequate warnings or instructions concerning the safe manner in which to use it." 89 Wash.2d at 479. Thus, "a product may be deemed 'defective' and a manufacturer incur liability for failure to adequately warn of dangerous propensities of a product that it places in the stream of commerce." Id. at 478-79.

These cases make clear, then, that the manufacturer is not only under a duty to warn the end user how to avoid being injured by the product itself. Rather, it is black letter law in Washington that a manufacturer's duty is also to inform the consumer how to use the product safely. Baughn, 107 Wn.2d at 137 ("Strict liability may be established if a product, though faultlessly manufactured, is unreasonably dangerous when placed in the hands of the ultimate user by a manufacturer without giving adequate warnings *concerning the manner in which to use it safely.*"); Terhune v. A. H. Robins Co., 90 Wn.2d 9, 12, 577 P.2d 975 (1978) (same); Teagle, 89 Wn.2d at 155 (same). Thus, although the fact pattern in this case is novel, see Braaten, 137 Wash. App. at 42 (noting "[t]his is an issue of first impression in Washington"), the Court of Appeals' conclusion that "the manufacturers had a duty to warn regarding the safe

use of their products" is based on precedent that has been accepted in this Court for almost forty years.[5]

Indeed, petitioners' argument that Section 402A does not require them to warn of the risks of another manufacturer's product was squarely rejected by this Court in Teagle, supra. There, this Court, applying a strict products liability analysis under the Restatement (Second) of Torts §402A, held that a defendant manufacturer had a duty to warn of the dangers of using its product together with *another* product that the defendant did not even sell, supply or recommend:

> [A]ppellant knew that Viton O-rings were incompatible with ammonia, yet it did nothing more than recommend the use of Buna O-rings. It did not warn of the dangers which could result from using Viton O-rings with ammonia. The lack of this warning, *by itself,* would render the flowrator unsafe.

Teagle, 89 Wn.2d at 156 (emphasis added).[6] The defendant in Teagle did not manufacture the Viton O-rings; it did not sell or supply the Viton O-

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[5] Moreover, the Court of Appeals' decision here is not, as petitioners and their friends would paint it, an anomaly. A number of courts in asbestos-related cases in other jurisdictions have held that a duty to warn exists in circumstances virtually identical to those here, where the asbestos causing the injury was not made by the manufacturer but was used in conjunction with the manufacturer's equipment. These decisions have been extensively discussed in respondent's prior briefing before the Court of Appeals and this Court. Respondent in Simonetta v. Viad. Corp., No. 80076-6, which is before this Court as well, has also provided a thorough analysis of these decisions in his supplemental brief. To avoid repetitive argument, petitioner here refers the Court to this briefing and incorporates it herein by reference.

rings; it even recommended use of a different brand of O-rings. Id. at 155-56. Yet this Court held that the defendant's failure to warn of the risk of using *another manufacturer's* O-rings rendered the defendant's product unsafe. Id. at 156.

Similarly, in Bich v. General Electric, 27 Wash. App. 25, 29, 614 P.2d 1323 (1980), the Court of Appeals recognized a duty on the part of a manufacturer to warn about the use of another manufacturer's product in conjunction with its own. In Bich, an electrician was seriously injured when a transformer he was working on exploded. General Electric was the manufacturer of the transformer. The cause of the explosion was traced to a Westinghouse fuse that Bich had installed in the transformer. While the Court of Appeals held that General Electric had a duty to warn about its transformer, but not about the Westinghouse fuse, it noted that "[i]t would have been a simple and inexpensive matter for GE to have included on its fuses a warning not to substitute fuses." Id. at 33. Thus, in Bich, the court found that GE would have had to warn that use of another manufacturer's fuse with its product could cause injury. This mirrors respondent's claim here—that the equipment manufacturers had a simple

[6] The agent of injury in Teagle was anhydrous ammonia, which like the asbestos in this case, was not manufactured or supplied by defendant. Teagle, 89 Wn.2d at 151. As in this case, use of the product at issue in Teagle could result in exposure to a hazardous substance in the absence of safety warnings.

duty to warn that use of another manufacturer's product with their own -- a use that was, according to the record evidence, entirely foreseeable to the equipment manufacturers -- could cause injury. As in Bich, then, the petitioners had a duty to warn about the hazardous nature of using specific products in conjunction with their own.

### 2. Section 402A Also Imposes a Duty to Warn on Manufacturers for Foreseeable Alterations of Their Products

Section 402A makes clear that a product manufacturer will not have a duty to warn if its product underwent substantial change in its condition after leaving the manufacturer. Bich, supra, 27 Wash. App. at 29. Conversely, a product manufacturer continues to have a duty to warn if the alteration is not substantial—meaning that it was reasonably foreseeable. In Bich, there was evidence that it was acceptable practice to interchange GE and Westinghouse fuses. The Court of Appeals therefore found that whether the substitution was a substantial change was a question of fact. Id. at 29.

Bich therefore stands for the proposition that manufacturers have a duty to warn not only of any dangers inherent in the foreseeable uses of their products, but also of hazards attendant to all foreseeable modifications or alterations of their products. Thus, although the Court of

Appeals' decision did not rely on the Restatement's substantial change doctrine, it provides another ground in this case for affirming the Court of Appeals' ruling. Indeed, the evidence here is even stronger than in Bich because it shows that the addition of asbestos insulation to petitioners' equipment was not only acceptable, but *necessary*. As such, this alteration was not substantial, and petitioners had a duty to warn with respect to it. The Superior Court's ruling that there was not even a genuine issue of material fact with respect to petitioners' duty was in error.

### C. The Court of Appeals' Decision on Negligence Properly Focused on Uses of the Equipment

As with the analysis of the manufacturers' duty under strict liability, the Court of Appeals' discussion of duty in negligence is based on basic, black letter Washington law. As discussed below, the Court of Appeals' focus on the petitioners' duty to warn with respect to the uses of their equipment is buttressed by longstanding precedent from this Court.

#### 1. Under Section 388 of the Restatement and Governing Washington Case Law, Risks Arising from the Foreseeable Use of a Product Give Rise to a Duty to Warn

In 1965, this Court adopted Restatement (Second) of Torts §388 to define, with respect to negligence, the scope of the duty to warn owed by a product supplier. Mele v. Turner, 106 Wn.2d 73, 78, 720 P.2d 787 (1986).

Section 388 imposes liability "for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied," if the manufacturer:

> (a) knows or has reason to know that the chattel is or is likely to be dangerous *for the use* for which it is supplied, and
>
> (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Mr. Braaten presented evidence on each one of these factors. First, he used the equipment at issue in the manner for which it was supplied: none of the petitioners would deny that their equipment was meant to be used on ships. Second, the manufacturers expected their products to be used with asbestos-containing packing, gaskets, and insulation and expected that their products would be subject to regular maintenance. See, e.g., CP 1257-59: CP 781-86; CP 7235-37; CP 6216-17; CP 1288-89. Finally, they knew or should have known that regular maintenance of their equipment would release dangerous, respirable asbestos into the air, see, e.g., CP 1260; CP 794-99; CP 6159-60 (testimony of plaintiffs' expert Jerry Lauderdale); CP 6291-6307 (article giving notice to manufacturers such as Yarway and Crane that exposure to asbestos dust was hazardous), but nevertheless failed to warn potential end-users of this danger. CP

1263 (Buffalo Pumps); CP 7202 (DeLaval); CP 6280 (Yarway); CP 1309-10 (Crane). As such, there was more than sufficient evidence on this record to raise a genuine issue of material fact as to whether the petitioner manufacturers failed to warn foreseeable users about latent dangers arising from their products' intended use.

The Court of Appeals' conclusion that "the question of whether the manufacturers knew or should have known about the hazards of asbestos involved in the use of their products" should go to the jury is completely in line with generally accepted Washington law. In Haysom, supra, 89 Wn.2d at 476, defendant was the manufacturer of a Coleman stove that "burn[ed] a petroleum product commonly referred to as 'white gas.'" "The record [did] not establish whether the fuel used by Mrs. Haysom on the day of the accident was stored in a can manufactured by [defendant]." Id. Even though the plaintiff's injuries were caused by the *stove fuel* during the *use* of defendant's stove, however, this Court held that there was no error by the trial court in allowing the jury to decide this question rather than deciding it as a matter of law. Id. at 788-90. Although the jury ruled in favor of the defendant, the key point for present purposes is that the plaintiff was allowed to submit the issue of the manufacturer's duty with respect to the intended uses of its products to the jury.

Washington courts have never wavered from the focus on intended use in defining the reach of a duty to warn. Over 20 years ago, in a seminal Washington asbestos case, the court of appeals held: "The manufacturer's knowledge of its product and the foreseeability of the dangers latent in that product or in its intended and potential uses is the relevant inquiry in order to determine the reasonableness of the manufacturer's conduct in failing to give, or in giving, the warning that it did." Lockwood v. AC & S, Inc., 44 Wn. App. 330, 339, 772 P.2d 826 (1986), aff'd, 109 Wn.2d 235, 744 P.2d 605 (1987).

In Duvon v. Rockwell Int'l, 116 Wn.2d 749, 807 P.2d 876 (1991), this Court emphasized that Washington "adheres to Restatement (Second) of Torts §388" and quoted the section in its entirety. Id. at 758. The issue there was whether the defendant could be liable for injuries that the plaintiff suffered when exposed to ammonia gas (another manufacturer's product) while attempting to determine why the defendant's product had failed. Id. at 750-51. Plaintiff alleged that the defendant was negligent in failing to warn of the need to shut off an inlet valve when the filtering system on its product was down. Id. at 751. Although the plaintiff was injured by ammonia gas, which was not the defendant's product, the Court

held that defendant owed a duty to warn of the risk involved in the *use* of its product under Section 388. Id. at 758-59.

Here, the trial court simply ignored this longstanding rule regarding manufacturers' duty to warn users about foreseeable risks involved in the "use" of their products, and it allowed manufacturers that *know* their products will be used in conjunction with toxic, explosive or flammable substances to avoid liability for failing to warn consumers about how to use the products so as to avoid latent risks. That has never been the law in Washington, and surely should not be the law now.

### 2. The Court of Appeals' Analysis Under General Negligence Principles Is Supported by the Law and the Record Evidence

Even aside from Section 388, Washington jurisprudence on negligence emphasizes that the imposition of duty on a manufacturer for failure to warn is valid when the twin prongs of foreseeability and policy considerations are met. See Shepard v. Mielke, 75 Wash. App. 201, 205, 877 P.2d 220 (1994). The Court of Appeals considered both factors, and rightly held that imposing a duty in this case was warranted because (1) respondent's evidence raised a genuine issue of material fact with respect to whether petitioners "knew or should have known that exposure to released asbestos fibers was a hazard involved in the use of their

products," and (2) as a matter of policy "it is logical and sensible to place some duty to warn on the manufacturer who is in the best position to foresee the specific danger involved in the use of a product." Braaten, 137 Wash. App. at 49.

Public policy concerns manifestly support the Court of Appeals' analysis. It was foreseeable to the petitioners that their equipment would be used in conjunction with asbestos-containing products and that these products would be disturbed in the course of necessary maintenance of the equipment; in fact, the evidence shows that the equipment *required* the asbestos-products to function efficiently and safely. Thus, petitioners were well-positioned to evaluate the hazards attendant to their products' foreseeable uses. Requiring them to do so, and to provide warnings, does not impose an unlimited responsibility to inquire into every possible product that could be used in conjunction with their equipment. Instead, placing a duty to warn on the petitioners in this case simply requires them to warn of a use of their equipment that was necessary, foreseen, anticipated and indeed contemplated by these defendants.

Moreover, as in Bich, "it would have been a simple and inexpensive matter" for the petitioners to have provided such a warning; indeed, the United States government *required* the manufacturers to warn.

A military specification in the record provided: "A WARNING statement shall be used to call particular attention to a step of a procedure which, if not strictly followed, could result in serious injury or death of personnel." CP 2192. And the petitioners were in a unique position to warn. The evidence shows that a number of these manufacturers—such as Yarway (CP 6110-6145) and Crane Co. (CP 1273-1290)—published catalogues of their equipment, in which they advertised and sold asbestos-containing components to be used with their equipment. Warnings could easily have been provided in these catalogues. Moreover, petitioners helped produce specifications (Buffalo Pumps - CP 776) or provided technical manuals (DeLaval - CP 7141-78; Yarway - CP 6152) to be used by workers like Mr. Braaten.

Section 402A, comment c, emphasizes that "the burden of accidental injuries caused by products [should] be placed upon those who market them." Several of these defendants—DeLaval, Yarway, and Crane Co.—marketed and sold asbestos-containing components to be used in conjunction with their equipment. Moreover, all the equipment at issue in this case was marketed for naval uses, including uses in hot or steam applications, where the equipment required asbestos-containing insulation, gaskets, and packing to operate properly and efficiently. Given that (1)

these manufacturers marketed their products for use by the Navy, (2) the record evidence establishes that it was foreseeable to the manufacturers that their products would be used with asbestos, (3) the manufacturers knew or should have known of the dangers of asbestos, (4) the Navy required these manufacturers to warn about procedures (like the application or removal of asbestos-containing components) that would result in serious injury, and (5) it would have been a simple matter for these manufacturers to have provided warnings, public policy clearly favors an imposition of duty under these circumstances.

## CONCLUSION

For the above reasons, the court of appeals' decision should be affirmed.

Respectfully Submitted this 8th day of February, 2008.

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